

1 EDMUND G. BROWN JR., Attorney General
of the State of California
2 ARTHUR D. TAGGART
Supervising Deputy Attorney General
3 ELENA L. ALMANZO, State Bar No. 131058
Deputy Attorney General
4 1300 I Street, Suite 125
P.O. Box 944255
5 Sacramento, CA 94244-2550
Telephone: (916) 322-6121
6 Facsimile: (916) 324-5567

7 Attorneys for Complainant

8
9 **BEFORE THE**
BOARD OF REGISTERED NURSING
10 **DEPARTMENT OF CONSUMER AFFAIRS**
11 **STATE OF CALIFORNIA**

12 In the Matter of the Accusation Against:

13 JOSEPH PHILIP LOBACCARO,
a.k.a. JOSEPH P. LOBACCARO,
14 a.k.a. JOSEPH LOBACCARO
5912 Blackstone Drive
15 Rocklin, CA 95765

16 Registered Nurse License No. 290794
Nurse Practitioner Certificate No. 5688
17 Nurse Practitioner Furnishing No. 5688

18 Respondent.

Case No. 2008-56

OAH No. 2007100329

SECOND AMENDED ACCUSATION

19 Complainant alleges:

20 **PARTIES**

21 1. Ruth Ann Terry, M.P.H., R.N. ("Complainant") brings this Accusation
22 solely in her official capacity as the Executive Officer of the Board of Registered Nursing
23 ("Board"), Department of Consumer Affairs.
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1 health care systems include, but are not limited to, health facilities licensed pursuant to Chapter 2
2 (commencing with Section 1250) of Division 2 of the Health and Safety Code, clinics, home
3 health agencies, physicians' offices, and public or community health services.

4 (b) The practice of nursing within the meaning of this chapter means those functions, including
5 basic health care, that help people cope with difficulties in daily living that are associated with
6 their actual or potential health or illness problems or the treatment thereof, and that require a
7 substantial amount of scientific knowledge or technical skill, including all of the following:

8 (1) Direct and indirect patient care services that ensure the safety, comfort, personal hygiene, and
9 protection of patients; and the performance of disease prevention and restorative measures.

10 (2) Direct and indirect patient care services, including, but not limited to, the administration of
11 medications and therapeutic agents, necessary to implement a treatment, disease prevention, or
12 rehabilitative regimen ordered by and within the scope of licensure of a physician, dentist,
13 podiatrist, or clinical psychologist, as defined by Section 1316.5 of the Health and Safety Code.

14 (3) The performance of skin tests, immunization techniques, and the withdrawal of human blood
15 from veins and arteries.

16 (4) Observation of signs and symptoms of illness, reactions to treatment, general behavior, or
17 general physical condition, and (A) determination of whether the signs, symptoms, reactions,
18 behavior, or general appearance exhibit abnormal characteristics, and (B) implementation, based
19 on observed abnormalities, of appropriate reporting, or referral, or standardized procedures, or
20 changes in treatment regimen in accordance with standardized procedures, or the initiation of
21 emergency procedures.

22 (c) ““Standardized procedures,”” as used in this section, means either of the following:

23 (1) Policies and protocols developed by a health facility licensed pursuant to Chapter 2
24 (commencing with Section 1250) of Division 2 of the Health and Safety Code through
25 collaboration among administrators and health professionals including physicians and nurses.

26 (2) Policies and protocols developed through collaboration among administrators and health
27 professionals, including physicians and nurses, by an organized health care system which is not a
28 health facility licensed pursuant to Chapter 2 (commencing with Section 1250) of Division 2 of

1 the Health and Safety Code. The policies and protocols shall be subject to any guidelines for
2 standardized procedures that the Division of Licensing of the Medical Board of California and
3 the Board of Registered Nursing may jointly promulgate. If promulgated, the guidelines shall be
4 administered by the Board of Registered Nursing.

5 (d) Nothing in this section shall be construed to require approval of standardized procedures by
6 the Division of Licensing of the Medical Board of California, or by the Board of Registered
7 Nursing.

8 (e) No state agency other than the board may define or interpret the practice of nursing for those
9 licensed pursuant to the provisions of this chapter, or develop standardized procedures or
10 protocols pursuant to this chapter, unless so authorized by this chapter, or specifically required
11 under state or federal statute. "State agency" includes every state office, officer, department,
12 division, bureau, board, authority, and commission.

13 7. Business and Professions Code section 2836.1 provides in pertinent part
14 that: Neither this chapter nor any other provision of law shall be construed to prohibit a nurse
15 practitioner from furnishing or ordering drugs or devices when all of the following apply:

16 (a) The drugs or devices are furnished or ordered by a nurse practitioner in accordance with
17 standardized procedures or protocols developed by the nurse practitioner and the supervising
18 physician and surgeon when the drugs or devices furnished or ordered are consistent with the
19 practitioner's educational preparation or for which clinical competency has been established and
20 maintained.

21 (b) The nurse practitioner is functioning pursuant to standardized procedure, as defined by
22 Section 2725, or protocol. The standardized procedure or protocol shall be developed and
23 approved by the supervising physician and surgeon, the nurse practitioner, and the facility
24 administrator or the designee.

25 (c)(1) The standardized procedure or protocol covering the furnishing of drugs or devices shall
26 specify which nurse practitioners may furnish or order drugs or devices, which drugs or devices
27 may be furnished or ordered, under what circumstances, the extent of physician and surgeon

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1 supervision, the method of periodic review of the nurse practitioner's competence, including peer
2 review, and review of the provisions of the standardized procedure.

3 (2) In addition to the requirements in paragraph (1), for Schedule II controlled substance
4 protocols, the provision for furnishing Schedule II controlled substances shall address the
5 diagnosis of the illness, injury, or condition for which the Schedule II controlled substance is to
6 be furnished.

7 (d) The furnishing or ordering of drugs or devices by a nurse practitioner occurs under physician
8 and surgeon supervision. Physician and surgeon supervision shall not be construed to require the
9 physical presence of the physician, but does include (1) collaboration on the development of the
10 standardized procedure, (2) approval of the standardized procedure, and (3) availability by
11 telephonic contact at the time of patient examination by the nurse practitioner.

12 (e) For purposes of this section, no physician and surgeon shall supervise more than four nurse
13 practitioners at one time.

14 (f)(1) Drugs or devices furnished or ordered by a nurse practitioner may include Schedule II
15 through Schedule V controlled substances under the California Uniform Controlled Substances
16 Act (Division 10 (commencing with Section 11000) of the Health and Safety Code) and shall be
17 further limited to those drugs agreed upon by the nurse practitioner and physician and surgeon
18 and specified in the standardized procedure.

19 (2) When Schedule II or III controlled substances, as defined in Sections 11055 and 11056,
20 respectively, of the Health and Safety Code, are furnished or ordered by a nurse practitioner, the
21 controlled substances shall be furnished or ordered in accordance with a patient-specific protocol
22 approved by the treating or supervising physician. A copy of the section of the nurse
23 practitioner's standardized procedure relating to controlled substances shall be provided, upon
24 request, to any licensed pharmacist who dispenses drugs or devices, when there is uncertainty
25 about the nurse practitioner furnishing the order.

26 (g)(1) The board has certified in accordance with Section 2836.3 that the nurse practitioner has
27 satisfactorily completed (1) at least six month's physician and surgeon-supervised experience in

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1 the furnishing or ordering of drugs or devices and (2) a course in pharmacology covering the
2 drugs or devices to be furnished or ordered under this section.

3 (2) Nurse practitioners who are certified by the board and hold an active furnishing number, who
4 are authorized through standardized procedures or protocols to furnish Schedule II controlled
5 substances, and who are registered with the United States Drug Enforcement Administration,
6 shall complete, as part of their continuing education requirements, a course including Schedule II
7 controlled substances based on the standards developed by the board. The board shall establish
8 the requirements for satisfactory completion of this subdivision.

9 (h) Use of the term ““furnishing”” in this section, in health facilities defined in Section 1250 of
10 the Health and Safety Code, shall include (1) the ordering of a drug or device in accordance with
11 the standardized procedure and (2) transmitting an order of a supervising physician and surgeon.

12 (i) ““Drug order”” or ““order”” for purposes of this section means an order for medication which
13 is dispensed to or for an ultimate user, issued by a nurse practitioner as an individual practitioner,
14 within the meaning of Section 1306.02 of Title 21 of the Code of Federal Regulations.

15 Notwithstanding any other provision of law, (1) a drug order issued pursuant to this section shall
16 be treated in the same manner as a prescription of the supervising physician; (2) all references to
17 ““prescription”” in this code and the Health and Safety Code shall include drug orders issued by
18 nurse practitioners; and (3) the signature of a nurse practitioner on a drug order issued in
19 accordance with this section shall be deemed to be the signature of a prescriber for purposes of
20 this code and the Health and Safety Code.

21 8. Code section 2761 states, in pertinent part:

22 The board may take disciplinary action against a certified or licensed nurse
23 or deny an application for a certificate or license for any of the following:

24 (a) Unprofessional conduct, which includes, but is not limited to, the
25 following:

26 (1) Incompetence, or gross negligence in carrying out usual certified or
27 licensed nursing functions . . .

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1 (d) Violating or attempting to violate, directly, or indirectly, or assisting in or
2 abetting the violation of, or conspiring to violate any provision or term of this chapter or
3 regulations adopted pursuant to it....

4 9. California Code of Regulations, title 16, section ("Regulation") 1443
5 states:

6 As used in Section 2761 of the code, 'incompetence' means the lack of
7 possession of or the failure to exercise the degree of learning, skill, care and
8 experience ordinarily possessed and exercised by a competent registered nurse as
9 described in Section 1443.5.

10 10. Regulation 1443.5 states:

11 A registered nurse shall be considered to be competent when he/she
12 consistently demonstrates the ability to transfer scientific knowledge from social,
13 biological and physical sciences in applying the nursing process, as follows:

14 (1) Formulates a nursing diagnosis through observation of the client's
15 physical condition and behavior, and through interpretation of information
16 obtained from the client and others, including the health team.

17 (2) Formulates a care plan, in collaboration with the client, which ensures
18 that direct and indirect nursing care services provide for the client's safety,
19 comfort, hygiene, and protection, and for disease prevention and restorative
20 measures.

21 (3) Performs skills essential to the kind of nursing action to be taken,
22 explains the health treatment to the client and family and teaches the client and
23 family how to care for the client's health needs.

24 (4) Delegates tasks to subordinates based on the legal scopes of practice of
25 the subordinates and on the preparation and capability needed in the tasks to be
26 delegated, and effectively supervises nursing care being given by subordinates.

27 (5) Evaluates the effectiveness of the care plan through observation of the
28 client's physical condition and behavior, signs and symptoms of illness, and

1 reactions to treatment and through communication with the client and health team
2 members, and modifies the plan as needed.

3 (6) Acts as the client's advocate, as circumstances require, by initiating
4 action to improve health care or to change decisions or activities which are against
5 the interests or wishes of the client, and by giving the client the opportunity to
6 make informed decisions about health care before it is provided.

7 11. California Code of Regulations, title 16, section ("Regulation") 1471
8 states in pertinent part that: For purposes of this article:

9 (a) "Standardized procedure functions" means those functions specified in Business and
10 Professions Code Section 2725(c) and (d) which are to be performed according to "standardized
11 procedures";

12 (b) "Organized health care system" means a health facility which is not licensed pursuant to
13 Chapter 2 (commencing with Section 1250), Division 2 of the Health and Safety Code and
14 includes, but is not limited to, clinics, home health agencies, physicians' offices and public or
15 community health services;

16 (c) "Standardized procedures" means policies and protocols formulated by organized health care
17 systems for the performance of standardized procedure functions.

18 **COST RECOVERY**

19 12. Code section 125.3 provides, in pertinent part, that the Board may request
20 the administrative law judge to direct a licensee found to have committed a violation or
21 violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation
22 and enforcement of the case.

23 **FIRST CAUSE FOR DISCIPLINE**

24 **(Incompetence)**

25 13. At all times herein mentioned, Respondent was employed as a nurse
26 practitioner for the family medical practice of Roy Harris, M.D. in Rocklin, California
27 (hereinafter "facility").

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1 14. On or about August 6, 2004, patient A. M., a 31 year old female, went to
2 the facility for complaints of headaches. The patient's previous history indicated she was having
3 mild headaches every day and migraines four to five times per month. Respondent examined the
4 patient and gave her several prescriptions, including, but not limited to, 60 capsules of Fioricet
5 with Codeine with 2 refills. Respondent instructed the patient to take one to two capsules of the
6 Fioricet with Codeine "every four hours as needed for migraines". However, Respondent failed
7 to properly educate the patient about the habit-forming potential of Fioricet with Codeine. That
8 same day, Patient A. M. filled her first prescription for Fioricet with Codeine and began to use
9 the medication incorrectly by taking it "every four hours" instead of "every four hours as needed
10 for migraines".

11 15. On and between August 6, 2004, and October 2004, Respondent continued
12 to refill Patient A. M.'s prescription for Fioricet with Codeine. However, prior to refilling this
13 medication for the patient, Respondent failed to be attentive in detail when writing the patient's
14 prescriptions by failing to including complete dosing recommendations, failed to monitor the
15 refills the patient was receiving, and failed to question the patient's statements made to the
16 nursing assistant prior to increasing her preventative medication.¹

17 16. Respondent is subject to disciplinary action pursuant to Code section
18 2761, subdivision (a)(1), on the grounds of unprofessional conduct. Respondent was guilty of
19 incompetence in his care of patient A. M. within the meaning of Regulation 1443, as follows:
20 On and between August 6, 2004, and October 2004, Respondent failed to exercise competent
21 nursing practice in writing prescriptions for Fioricet with Codeine for patient A. M., as set forth
22 above.

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28 1. Patient A. M. developed a dependency on Fioricet with Codeine, was diagnosed with
iatrogenic drug addiction, and went through a detox program with Dr. David D.

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5. Taking such other and further action as deemed necessary and proper.

DATED: 3/18/08


RUTH ANN TERRY, M.P.H., R.N.
Executive Officer
Board of Registered Nursing
Department of Consumer Affairs
State of California
Complainant